

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: Muscle Foods Limited

Of: Unit L Fulcrum Business Park, Vantage Way, Poole, Dorset, BH12 4NU

1. The Information Commissioner ("Commissioner") has decided to issue Muscle Finance Limited ("MFL") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is in relation to a contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") by MFL.
2. This notice explains the Commissioner's decision.

Legal framework

3. MFL, whose registered office is given above (companies house registration number: 09019725), is the organisation (person) stated in this notice to have transmitted unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR provides that:

“(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.

(2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where –

- (a) That person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or device to that recipient;
- (b) The direct marketing is in respect of that person’s similar products and services only; and
- (c) The recipient has been given a simple means of refusing (free of charge except for the costs of transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

(4) A subscriber shall not permit his line to be used in contravention of paragraph (2).”

5. Section 122(5) of the DPA defines “direct marketing” as “the communication (by whatever means) of any advertising material which

is directed to particular individuals". This definition also applies for the purposes of PECR.

6. "Electronic mail" is defined in regulation 2(1) PECR as " any text, voice, sound or image sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service".
7. Consent is defined in Article 4(11) the General Data Protection Regulation 2016/679 as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".
8. The DPA contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of PECR by Schedule 1 PECR.
9. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, he may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.
10. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of part 9, Schedule 20 of that Act).

The contravention

11. The Commissioner finds that MFL has contravened Regulation 22 of PECR. The Commissioner finds that the contravention was as follows:
12. Between 25 March 2019 and 25 October 2019 MFL transmitted 135,651,627 emails and 6,354,426 SMS (totalling 142,006,053 unsolicited communications) over a public electronic communications network by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
13. Organisations cannot generally send marketing emails or SMS unless the recipient has notified the sender that they consent to such emails being sent by, or at the instigation of, that sender.
14. The Commissioner is satisfied that MFL did not have the necessary consent required by Reg 22(2) to send marketing communications to subscribers. Nor was MFL able to avail itself of the 'soft opt-in' provided by regulation 22(3). An organisation which is reliant upon regulation 22(3) of PECR to send marketing emails and SMS to its customers, must ensure the recipient has been given a simple means of refusing the use of his contact details for the purposes of such direct marketing at the time that the details were initially collected. MFL failed to do so.
15. The Commissioner is satisfied that MFL was responsible for this contravention.
16. MFL has continued to send marketing emails to individuals without any apparent remedial measures having have been taken to prevent further contraventions of regulation 22 PECR. This is evidenced by a further 467 complaints made about marketing emails and SMS sent by MFL (9

direct to the Commissioner, 2 SMS complaints via the OLRT and 456 complaints via 7726 SPAM reporting service) since completion of the Commissioner's investigation to the date of this Notice.

17. The Commissioner has considered, as she is required to do under section 40(2) of the DPA (as extended and modified by the Regulations) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The Commissioner has decided that it is unlikely that actual damage has been caused in this instance.
18. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of her powers under section 40 DPA, she requires MFL to take the steps as specified in Annex 1 of this Notice.**

Rights of Appeal

19. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated the 1st day of March 2021

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

TERMS OF THE ENFORCEMENT NOTICE

MFL shall within 35 days of the date of this notice:

(1) Except in the circumstances referred to in paragraphs (3) of regulation 22 of PECR, neither transmit nor instigate the transmission of unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.

(2) Where MFL relies upon regulation 22(3) of PECR to send marketing communications, to ensure:

- (a) MFL has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or device to that recipient;
- (b) The direct marketing is in respect of MFL's similar products and services only; and
- (c) The recipient has been given a simple means of refusing (free of charge except for the costs of transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

ANNEX 2

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the "Tribunal") against the notice.

2. If you decide to appeal and if the Tribunal considers:-

a) that the notice against which the appeal is brought is not in accordance with the law; or

b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ
Telephone: 0300 123 4504
Email: grc@justice.gov.uk

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent

4. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).